No. 20308

(No. 20656 Consolidated)

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

ANGUS J. DE PINTO and MARGARET F. DE PINTO,

Appellants,

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,

Intervenor-Appellant,

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG,

Appellees.

BRIEF OF APPELLEES

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Opinion Below

A prayer for a preliminary injunction was denied in an opinion and order. (T.R. 9). Later appellees moved for summary judgment which was granted in an order which incorporated the

above referred to opinion. (T.R. 47).

Jurisdiction

Appellees incorporate herein the statement of jurisdiction contained in appellants' opening brief at page 2 thereof.

Questions Presented

(1) Whether there was any genuine issue of material fact preventing summary judgment?

(2) Whether appellees were entitled to summary judgment as a matter of law?

(3) Whether the trial judge abused his discretion in denying appellants a preliminary injunction?

Statement Of The Case

Following the June 28, 1965 entry of judgment against appellant Angus J. DePinto in Doig v. DePinto and Provident, Civil No. 2974, Phoenix, U.S. District Court, appellants filed this action on July 12, 1965. The complaint seeks a permanent injunction prohibiting execution of the judgment in Civil No. 2974 against the community property of appellants Angus J. DePinto and Margaret F. DePinto. (T.R. 1, 4, 5). A motion for a temporary restraining order without notice was denied by U.S. District Judge James Walsh. (T.R. 7). On July 21, 1965, U.S. District Judge Carl A. Muecke heard testimony and received evidence with respect to appellants' motion

for a preliminary injunction. (R.T. 1). After hearing appellants' evidence and lengthy oral argument, several memoranda were filed after which Judge Muecke filed on August 4, 1965 a written opinion and order denying the preliminary injunction. (T.R. 9, 54). A motion for an injunction pending appeal of the denial of the motion for a preliminary injunction was then filed and later denied. (T.R. 54, 55).

Thereafter, on August 14, 1965, appellants filed a motion in this court seeking an injunction pending appeal. However, on August 18, 1965, while the motion here was pending, appellant Angus J. DePinto filed a voluntary petition for an arrangement under Chapter XI of the Bankruptcy Act, and obtained, without notice, a restraining order signed by a Referee in Bankruptcy which order prevented further execution of the judgment in Civil No. 2974. About September 14, 1965, appellant Angus J. DePinto filed sworn schedules in the said bankruptcy proceeding listing total community liabilities of $2,113,931.93 and total community assets of $754,109.44. (Exh. E, No. 20460 here). Later, on or about September 20, 1965, this court, without having been given notice by appellants of the existence of the restraining order issued by the Referee in Bankruptcy, denied appellants' motion for an injunction pending appeal.

Subsequently, appellees filed the motion for summary judgment which was granted about December 8, 1965.

On March 10, 1966 appellant Angus J. DePinto filed a voluntary consent to be adjudicated a bankupt. His spouse has filed a statement therein to the effect that such bankruptcy comprehends the community property. Following the voluntary consent of appellants, the trustee in bankruptcy intervened here. To date the restraining order prohibiting execution of the judgment in Civil No. 2974 is still in force in the bankruptcy court despite efforts of appellee to obtain a decision thereon.

The facts adduced at the July 21, 1965 hearing on appellants' motion for a preliminary injunction are as follows:

Appellants moved to Phoenix, Arizona in 1936. (R.T. 11, 111). Upon arrival there, according to the testimony of each, they owned nothing. (R.T. 10, 112). Each testified that everything acquired subsequent to 1936 was community property. (R.T. 10, 11, 111, 112).

In 1947 the appellants met James E. Kelly and the latter's wife in Carlsbad, California, before the Kellys became residents of Phoenix, Arizona. (R.T. 28, 112). The DePintos became very friendly with the Kellys, occupied summer homes next to each other in Carlsbad, California from 1948 until 1960, entertained each other, visited each other's homes, and remained friends until 1959 or 1960. (R.T. 28, 112). Mrs. DePinto and Mrs. Kelly were friends as well as the children of both families. (R.T. 66). Angus J. DePinto made several trips from Phoenix, Arizona to Carlsbad, California with

James E. Kelly via either automobile or airplane. (R.T. 28).

On June 16, 1952, Life Underwriters, Inc., a management corporation, was incorporated under the laws of Arizona. (R.T. 29). James E. Kelly was the president and a director of Life Underwriters, Inc. (R.T. 30). Prior to October 1, 1952, Kelly discussed with DePinto the business affairs of Life Underwriters, Inc. (R.T. 29). DePinto understood that the purpose of Life Underwrit Inc. was to take over smaller companies and to sell life insurance. (R.T. 29). On October 1, 1952, Life Underwriters, Inc. issued a prospectus for the sale of stock to the public. (R.T. 30). The said prospectus stated that DePinto was one of Life Underwriters, Inc.'s directors. (R.T. 30). DePinto was, prior to October 18, 1957, for a period of two years, a director of Life Underwriters, Inc., and DePinto knew that his name was being used as a director of Life Underwriters, Inc. (R.T. 30). DePinto also owned stock in Life Underwriters, Inc. for which he paid $2,000. (R.T. 29, 30).

On November 21, 1952, about a month and a half after the Life Underwriters, Inc. prospectus was issued, articles of incorporation were filed for United Security Life. (R.T. 31). Through Kelly, DePinto became aware, late in November or December of 1952, that United Security Life was in existence. (R.T. 31). Prior to December 15, 1952, United also prepared a prospectus for the sale of its stock to the public. (R.T. 31). The said United Security

Life prospectus, under the heading entitled "Relationship with Life Underwriters, Inc.", stated that Life Underwriters, Inc. was the exclusive operating management and sales agent for United Security Life, and that DePinto was a director of Life Underwriters, Inc. (R.T. 31, 32). The said United prospectus set forth information about DePinto. (Exh. A, R.T. 126). DePinto both knew and presumed that Kelly was using DePinto's name in prospecti issued by United, and actually saw a prospectus himself. (R.T. 32, 105). Stock in United was sold to the public by 25 to 40 salesmen, and life insurance was sold to members of the armed forces. (R.T. 32). DePinto knew that his name was being used by Kelly in selling stock of United to the public. (R.T. 45).

Thereafter, on March 29, 1955, a meeting of United's board of directors was held at which a Doctor Harry Cumming or James Burke complained about the management of United under Kelly. (R.T. 33). DePinto attended the said March 29, 1955 meeting because Kelly asked him to attend, and while at the meeting he saw and heard James Burke and Doctor Harry Cumming. (R.T. 33). The gist of the complaints by Burke was that United was not being administered properly, and that the stockholders were in danger of losing their money. (R.T. 40).

On October 14, 1955 DePinto was elected a director of United. (R.T. 33). DePinto became a director to help United and Kelly. (R.T.

At the time DePinto became a director of United, he knew that United was selling life insurance to members of the armed forces at Army, Navy, and Air Force depots. (R.T. 34). At the time he became a director of United, DePinto never intended to be active although he had previously had three years experience as a member of the board of directors of the Phoenix Country Club whose meetings he attended regularly. (R.T. 33). In becoming a director of United, DePinto fostered a family friendship by "helping a fellow who already was a friend."(R.T. 70).

A few months after becoming a director of United, DePinto's spouse, appellant Margaret F. DePinto, was aware of the fact, but never objected to his being a director of United. (R.T. 71).

During his tenure as a director of United, DePinto attended none of the meetings of the board of directors. (R.T. 36). When such directors' meetings were held, DePinto was earning money for the marital community. (R.T. 45). One of his patients was Mrs. Kelly whose child he delivered. (R.T. 54). DePinto was unable to state that no other patients were referred to him by other directors of United. (R.T. 54).

Prior to becoming a director of United in 1955, DePinto had acquired, before 1948, a parcel of real estate in Yuma County, Arizona in joint ownership with one J.L. Jenkins. (R.T. 42). J.L. Jenkins also became a director of United at about the time DePinto became a director. (R.T. 42).

When asked by members of the public what he thought of United, DePinto never told any such persons that he was not acting on behalf of the community while a director of United, and it was not until after the complaint was filed in Civil No. 2974 that he first so claimed. (R.T. 57, 60). Except for the indebtedness reflected in the judgment in Civil No. 2974, DePinto never disclaimed any other indebtedness as not owing by the marital community on the ground that it was a separate debt. (R.T. 64). Every debt ever paid by DePinto in the preceding 29 years was paid by DePinto from community property funds. (R.T. 64). In 1960 DePinto posted $175,000 of the community's cash as collateral to secure a supersedeas bond on appeal from the judgment entered against him in Civil No. 2974. (R.T. 51).

DePinto's spouse was told very little by DePinto concerning the management of the marital community, and was even unaware he had purchased stock in Life Underwriters, Inc. (R.T. 55, 118). DePinto wrote the checks, took care of banking matters, arranged for financing of buildings, signed leases with the tenants, and in general supervised and managed the business affairs of the community. (R.T. 118).

Other than the claim being made here that DePinto's directorship in United was not a community activity, DePinto never had any separate activities and every business matter he engaged in was one

in which DePinto's spouse shared both the profits and the losses. (R.T. 52, 62, 63).

During his service as a director of United Security Life, DePinto traveled to San Diego, California with James E. Kelly via airplane, and on at least one occasion his air fare was paid for by United Security Life. (R.T. 43). When asked to produce evidence which would show that he had repaid such air fare, De Pinto was unable to produce a cancelled check and claimed that he paid the sum to Kelly in cash upon arrival in San Diego. (R.T. 44). He did not explain why the ticket was paid for in cash upon arrival in San Diego and not in cash before boarding the airplane in Phoenix.

During the years 1960 through 1964, appellants claimed federal income tax deductions for the cost of litigating Civil No. 2974 as incurred "for the management, conservation, or maintenance of property held for the production of income." (Exh. C, D, E-1, E-2, F). The only property owned by appellants being community property, the said deductions were claimed for the conservation of community property. (R.T. 10, 11, 111, 112).

The first time DePinto ever claimed that when acting as a director of United he was not serving a community purpose was after the complaint was filed in Civil No. 2974, and while with his legal counsel. (R.T. 60). Prior to that time it was his understanding that he had no liability or responsibility in acting as a director, and therefor had no occasion to disavow the activity as community activity.

Argument

Before turning to the specific legal and factual materials sustaining the district court's orders granting summary injunction and denying a preliminary injunction, the court is earnestly asked to consider the following information concerning who and what is now involved in the instant litigation.

This court has already recognized the importance in any litigation of knowing who are the real parties in interest in contrast to who may be appearing for them in court. Niesz v. Gorsuch, 9 Cir., 1961, 295 F.2d 909; DePinto v. Provident Security Life Insurance Company, 9 Cir., 1963, 323 F.2d 826; Gorsuch v. Fireman's Fund Insurance Company, ___ F.2d ___ (Dck. No. 19887, 9 Cir., 1966). It did so by pointing out that the real beneficiaries of any judgment in Civil No. 2974 were the 383 former stockholders of United Security Life. Such a judicial approach is a common practice by courts who use such knowledge to judge the weight to be given arguments being advanced, and to help fashion proper remedies.

Consequently, it is equally important to focus attention on the fact that appellants are no longer the real litigants here, but are merely nominal parties who have no stake in the outcome of this litigation or that other pending appeal entitled DePinto and Donohue v. Provident Security Life Insurance Company, Dck. No. 20553, 9 Cir.

Because appellants voluntarily consented to be adjudicated

bankrupt on March 10, 1966, having filed sworn schedules therein showing that the community's total liabilities were $2,113,931.93 whereas its total assets were only $754,109.44, it is evident that no monetary benefit could accrue to them should it ever be held in this litigation that the judgment and interest of $462,739.74 in Civil No. 2974 could not lawfully be satisfied from the community assets. Why? Because all that would happen, insofar as appellants are concerned, is that the community's total of liabilities would be reduced from $2,113,931.93 to $1,651,192.19 while the total of assets would remain at $754,109.44. Thus, the marital community in bankruptcy would still owe $897,082.75 more than its total assets even if a decision were ultimately rendered here or in Civil No. 2974 (Dck. No. 20553, 9 Cir.) eliminating the $462,739.74 judgment or preventing its collection from the community assets. Nor would appellants benefit monetarily insofar as separate property is concerned since each has testified repeatedly herein that everything appellants own is community property.

Thus, it appears reasonable to ask why bankrupt appellants would press this appeal in view of the expensive printed briefs which have been filed in the two matters, the continued presence of qualified counsel who are acting for appellants, and the cost of further research and legal counsel in proceeding with this and the other appeal. In short, why would a bankrupt marital community expend

large sums of money to continue an appeal attempting to eliminate a community liability which, if removed, still leaves that community with $897,082.75 more in debts than assets? The answer is that such persons would not expend such sums, and it is therefore obvious that the real parties in interest here are the general creditors of appellants' marital community in bankruptcy whose claims arose several years after the first two judgments were entered in Civil No. 2974. These bankruptcy general creditors are formally represented by the trustee in bankruptcy who intervened here recently. They are joined in spirit, if not in substance, by the Massachusetts Mutual Life Insurance Company, which, also represented by Evans, Kitchel & Jenckes, counsel for appellants here, filed a petition in the bankruptc court on June 2, 1966 seeking authority to proceed against Angus J. DePinto in a suit filed before judgment was entered in Civil No. 2974, on a promissory note in the approximate amount of $1,063,007.50. The petition also seeks authority to foreclose on a $1,063,007.50 first mortgage owed by Trosco Land, Inc. Appellee has been assured by competent and experienced owners and operators of the kind of medical building, which is the subject of the Massachusetts Mutual Life Insurance Company mortgage granted to Trosco Land, Inc., that such foreclosure will fall short by at least $300,000. Thus, Massachusetts Mutual Life Insurance Company will be a general creditor of appellants community for the approximate sum of

$300,000 along with the approximately $355,112.03 of additional Trosco Land, Inc. debts which DePinto guaranteed and which will fall upon the marital community.[1] The total of the above items plus the $70,000 owed by the community to James C. Trisoliere is $725,112.03.[2] Thus, it is general creditors who are the real parties in interest. Appellants are merely bystanders.

The foregoing reflects that those who are appealing here in the guise of protectors of the sanctity of marital community property anxious to prevent fraud against a wife are actually commercial general creditors of a bankrupt community who are being led into battle by Massachusetts Mutual Life Insurance Company and the trustee in bankruptcy. Appellee acknowledges that there is nothing wrong at all with the efforts of creditors who extended credit to appellants' community several years after the first two judgments

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1. Appellants own approximately one third of the outstanding stock of Trosco Land, Inc. the corporation whose debts of $1,418,119.53 DePinto guaranteed according to Schedule A-4 of Exhibit E, Docket No. 20460 here. This is the corporation against whom Massachusetts Mutual Life Insurance Company is foreclosing the first mortgage of approximately $1,063,007.50. Horton v. Donohue-Kelly Banking Co., Wash., 1986, 46 P. 409, held where the husband held stock in the corporation for the benefit of the community, liability incurred by reason of husband's guaranty of corporate debt, community property is liable. Appellant DePinto testified here that when he assumed the directorship of Trosco Land, Inc., he did so with the intent of benefiting the marital community. (R.T. 47). Thus, he is liable and the community is liable on the aforesaid guarantees.
2. See Schedule A-3 of Exhibit E attached to Petition for Writ of Mandamus in Docket No. 20460 here. This $70,000 debt came into existence in May of 1965 as a result of the purchase by appellants of the stock in Trosco Land, Inc. owned by Mr. Trisoliere.

in Civil No. 2974 were entered from attempting to collect their debts by eliminating the judgment in Civil No. 2974 rendered for the benefit of United's former shareholders.[3] However, question is raised as to the validity of invoking here the sanctity of the community property when that marital community is hopelessly insolvent, and neither member of that community can obtain $1 of benefit from the decision which the general creditors request in the name of the marital community. Query also whether that community exists any longer insofar as the community property in bankruptcy is concerned?

For the following reasons, the present appeals should be dismissed.

I

The District Court Did Not Err In Granting Appellees' Motions For Summary Judgment Because There Was No Genuine Issue Of Material Fact And Appellees Were Entitled To It In Law.

Rule 56 (c), Federal Rules of Civil Procedure, provides that the judgment sought by a motion for summary judgment:

" ... shall be rendered forthwith if the pleadings,

3. No doubt these general creditors will proceed, in the event no success is effected here or in Dck. No. 20553, to the bankruptcy court in an effort to have the judicial lien in Dck. No. 20553 declared null and void so that the judgment in Dck. No. 20553 would share and share alike with their $725,112.03 in which event the recovery in Dck. No. 20553 could not exceed 39 cents

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Thus, the questions with respect to appellants' appeal from the summary judgment granted by Judge Muecke are: (A) what is the applicable law, and (B) are there any genuine issues of material fact?

A.

Under Present Arizona Law The Community Is Liable For The Negligence Or Breach Of Fiduciary Duty Of The Husband Committed While A Corporate Director Whether Or Not He Was Serving A Community Purpose While Acting As A Director.

The major premise of appellants' legal argument is that the marital community in Arizona is not liable for the negligence or breach of fiduciary duty of the husband as a corporate director unless while a director he was serving one or more community purposes. Their minor premise is that Angus J. DePinto did not serve any community purpose in accepting and acting as a corporate director of United Security Life. Hereafter, in subpart B, appellee will note some of the community purposes which were furthered

by DePinto's assumption of a corporate directorship in United Security Life, and the reasons why there is no genuine dispute as to each community purpose or benefit on the assumption that the rule is as stated by appellants. Here, however, the point is submitted that recent Arizona cases have made it plain that the corporate director who commits a tort or breach of fiduciary duty against his corporation cannot hide behind the skirts of his wife when called to account from the only property most citizens of a community property state own - community property.

In 1956 the Arizona Supreme Court in Mortensen v. Knight, 81 Ariz. 325, 305 P.2d 463 (1956), discredited its previous practice of placing the greatest weight on the community property decisions of the state of Washington. After a lengthy review and analysis of the history and theory of the Arizona community property system, the court said:

(1) " The State of Washington adopted its community property act on December 2, 1869, following Arizona by nearly four years."

(2) " ... while the source of the Arizona community property system is California, a comparison with the Constitution of the State of Texas, 1845, Vernon's Ann. St. Article VII, Section 19, shows that Article XI, Section 14, Constitution of California, supra, is identical to that of Texas."

(3) " From the foregoing we are compelled to conclude that the decisions of the State of Washington, while informative, are not necessarily more persuasive than either those of the state of California or Texas."

Therefore, since there is no Arizona decision holding that the community is not liable for the negligence or breach of fiduciary duty of the husband corporate director unless he was furthering a community purpose or benefit while holding such office, what is the law of California and Texas?

In California, community property is subject to liability for the husband's torts whether committed while serving a community purpose or not. Grolemund v. Cafferata, 17 Cal. 2d 679, 111 P. 2d 641 (1941). See also Vest v. Superior Court, 294 P. 2d 988 (D. C. App. 1st). The same rule applies in Texas where the community is liable for the torts of either spouse. 10 A. L. R. 2d § 9 at 997.

That Arizona's Supreme Court is following in the direction of California and Texas is vividly shown by the 1964 decision in Gardner v. Gardner, 95 Ariz. 202, 388 P. 2d 417 (1964). There it was held that alimony owed to a former wife by a husband could be collected from the community of the husband and the new wife. In short, what was clearly a separate debt of the husband was collected from the marital community.

The cases cited by appellants are prior to Gardner v. Gardner,

supra, do not support the principle that a marital community is not liable for the negligence of the corporate director husband unless the latter was serving a community purpose, and are based on a 1925 case which no longer supports the principle for which appellants cited it.

Thus, at page 12 of their opening brief, appellants make the incorrect statement that "the community property of husband and wife is not liable for, or subject to, the separate debts or obligations of either spouse," and then cite as authority therefor six cases. The first, Cosper v. Valley Bank, 28 Ariz. 273, 237 P. 175 (1925), was expressly limited by the 1964 decision in Gardner v. Gardner, supra, to the narrow principle that "community property cannot be reached to satisfy separate contractual debts of the husband." The second case, Payne v. Williams, 47 Ariz. 396, 56 P.2d 186 (1936), after stating the principle as appellants do, immediately cited as its sole authority therefor Cosper v. Valley Bank, supra. Thus, it too has been limited by the Gardner case, supra. The third case, Tway v. Payne, 55 Ariz. 343, 101 P.2d 455 (1940) also cited Cosper v. Valley Bank as its sole authority for the broader statement of principle which was limited by Gardner v. Gardner, supra, when it narrowed Cosper v. Valley Bank, supra. The fourth case was Babcock v. Tam, 9 Cir., 1946, 156 F.2d 116, in which this court cited Cosper v. Valley Bank, supra, and interpreted the law as

then holding that a judgment arising out of a transaction wholly regarding separate property and in no way affecting community interests could not be collected from the community. Therefore, Babcock v. Tam, supra, has also been narrowed by Gardner v. Gardner, supra, which interpreted Cosper v. Valley Bank, supra, as limiting collection against the community property of the separate contractual debts of the husband. The fifth case cited by appellants, Shaw v. Greer, 67 Ariz. 223, 194 P.2d 430 (1948), after setting forth the broader statement set forth by appellants, cited as the authority therefor Cosper v. Valley Bank, supra, and Payne v. Williams, supra, both of which were restricted by Gardner v. Gardner, supra. The sixth and final case, Barr v. Petzhold, 77 Ariz. 399, 273 P.2d 161 (1954), is another of the pre Gardner v. Gardner, supra, cases in which the dicta stated the rule as urged by appellants.

It is plain therefore that the rule is not that "the community property of husband and wife is not liable for, or subject to, the separate debts or obligations of either spouse", as previously set forth in the above cases all built on the foundation of the principle announced in Cosper v. Valley Bank, supra. The rule is simply that "community property cannot be reached to satisfy separate contractual debts." Gardner v. Gardner, supra. Therefore, the inference which was left by appellants' statement in the first paragraph of page 12

of their opening brief - that it is to be naturally expected that in order to hold the community liable for a tort claim against the husband, it is necessary to show that community purposes were being served and thus the debt was not a separate debt - is incorrect. Therefore, the cases which are cited thereafter from page 12 through page 22 of appellants' opening brief need to be examined to determine if they actually support appellants' thesis that with respect to tort claims, particularly those based on negligence, the community cannot be held liable therefor unless community purposes were being served.

First, at page 12 of their brief, an interesting statement is submitted. It is that "the community is liable for damages resulting from the acts of a spouse which are done while furthering a community purpose." The case cited in support is Hays v. Richardson, 95 Ariz. 64, 386 P.2d 791 (1963). The court is asked to note that appellants do not state or cite the Hays case, supra, in support of the contention that the community cannot be held liable unless some community purpose was being served by the tortfeasor husband. Instead all that is said is that the community is liable for damages resulting from the acts of a spouse which are done while furthering a comminity purpose. It is merely an inference which is left that the Hays case, supra, holds that the community cannot be held liable unless some community purpose is being served by the tortfeasor. However, the Hays case, supra, which was decided before Gardner v. Gardner,

simply pointed out that "it is undisputed that if one spouse is negligent while furthering a community purpose, the community is liable for damages resulting therefrom", and went on to find that a father driving to pick up his children who had participated in a television show was engaged in a community purpose. That is, the court was not required to rule on the question of whether the community can be held liable for the negligence of the husband while not furthering a community purpose. All that was necessary to dispose of the case was to point out that no one, regardless of the side taken, disagreed with the principle that if a father was engaged in furthering a community purpose, then obviously the community is liable, and that since community purposes were being served there it followed that the community was liable. For example, the instant appeal could be disposed of on the ground that the record shows community purposes were being served by appellant Angus J. DePinto, and therefore the community is liable for the subject negligence. But that would not amount to a holding by this court that the community can only be held liable in Arizona if the father tortfeasor was engaged in a community purpose when the tort was committed. In such an event it would not be correct to so cite the instant case. Therefore, it is not correct to so cite Hays v. Richardson, supra, when it did not decide more than it was required to decide.

The second case cited for its proposition respecting the tort liability of the community is McFadden v. Watson, 51 Ariz. 110,

74 P.2d 1181 (1938). But this case solely and expressly relied on Cosper v. Valley Bank, supra, to support the broad principle that "community property is liable only for community debts, and not for the separate obligations of either of the spouses." Since Cosper v. Valley Bank, supra, has severely restricted this rule now that it has been reinterpreted by Gardner v. Gardner, supra, this case does not support appellants' argument. McFadden v. Watson, supra, can no longer be correctly cited as meaning that a community is only liable for community debts and not for any separate debts.

The third case, cited at page 13 of their opening brief, is Rodgers v. Bryan, 82 Ariz. 143, 309 P.2d 773 (1957). There the Arizona Supreme Court merely acknowledged a contention by the appellants there that the tort was not in furtherance of a community interest, and disposed of the case on the facts by finding that a community purpose was served. It did not take up the question of law as to whether the contention made by appellants was correct or not. It simply struck down their factual premise.

Appellants' fourth case in support of their inference that the community is liable for the tort of the husband only if committed while serving a community purpose is Babcock v. Tam, 9 Cir., 1946, 156 F.2d 116. As noted earlier herein this case in another pre 1964 Gardner v. Gardner, supra, case in which this court correctly cited and relied on the broad rule of Cosper v. Valley Bank, supra, that

now has been restricted to the principle that the community property cannot be reached to satisfy the separate contractual debts of the husband. Also, this court then relied, as the Arizona courts did then, most heavily on the community property law of the state of Washington. Although Babcock v. Tam, supra, was a correct interpretation of Arizona law at the time it was decided, its Arizona law foundations have been swept away by Mortensen v. Knight, supra, and Gardner v. Gardner, supra, and the clear direction of the Arizona decisions since that time.

The fifth case cited by appellants is Shaw v. Greer, 67 Ariz. 223, 194 P.2d 430 (1948). But this is one of the cases which relied on Cosper v. Valley Bank, supra, to support the principle that "community property is liable only for community debts and not for the separate obligations of either of the spouses." Then using that very broad principle to support the need to exclude everything which was a separate debt, it went on to review the Washington law and found that there a debt resulting from a malicious tort was a separate debt. The foundation of this case has been taken away by Gardner v. Gardner, supra, and it does not support the principle that the community is liable only for community debts and not for any separate debts or obligations of either spouse.

The sixth case cited by appellants, Perkins v. First National Bank of Holbrook, 47 Ariz. 376, 56 P.2d 639 (1926), falls under

the same disability since it too relied on Cosper v. Valley Bank, supra, to support the statement that "the community was not liable for a debt contracted by the husband in no way connected with the community and from which the community received no benefit." Thus, it too has been limited by the narrowed holding of Cosper v. Valley Bank, supra.

Appellants' seventh case is Payne v. Williams, supra, found at page 17 of their opening brief. As set forth earlier this case was also narrowed down by Gardner v. Gardner, supra, since it relied solely on Cosper v. Valley Bank, supra.

The foregoing cases, cited by appellant to support the principle that the community is liable for the torts of the husband only if committed while the latter was furthering a community purpose, all rest on the broad and earlier statement of the rule in Cosper v. Valley Bank, supra, that the community is liable only for community debts and not for the separate debts or obligations of either spouse. Based on such a rule it would follow that since the community was liable only for community debts, it therefore would be necessary to show that community purposes had been served in order to hold the community liable. However, Cosper v. Valley Bank, supra, now means, according to the Arizona Supreme Court, that the "community property cannot be reached to satisfy separate contractual debts of the husband." Thus, neither Cosper v.

Valley Bank, supra, nor the foregoing cases relying on it, support the principle for which they were cited by appellants. The major premise of appellants legal argument cannot be that the community is liable only for the tort of the husband committed while furthering a community purpose nor that the community is liable only for community debts. The only major premise available under the case law he has cited is that the community cannot be reached to satisfy the separate contractual debts of the husband, and that major premise will not support the conclusion that the community is liable only for torts committed while furthering a community purpose.

Appellants' line of case citations assumes that the case upon which they all rest, Cosper v. Valley Bank, supra, is still intact. It is not, and an examination of Gardner v. Gardner, 95 Ariz. 202, 388 P.2d 417 (1964), will show how badly damaged it is. There the Arizona Supreme Court said that the key question was whether alimony from a prior marriage is a contracted debt. It then decided it was not, and held that the community property of the husband and his new wife was liable for such separate debt. By limiting the Cosper v. Valley Bank, supra, case to the rule that the community cannot be reached to satisfy separate contractual debts of the husband and then finding that the answer to the key question was that it was not, thereby permitting collection against the community, the Arizona Supreme Court laid to rest the principle that the community is only liable for

community debts. The opinion did not even bother to discuss any need for a community purpose in order to hold the community liable.

The decision in Gardner v. Gardner, supra, and the action of the court in Mortensen v. Knight, supra, freeing the court from the restrictions placed on it by the Washington decisions and turning instead to California and Texas, shows that Arizona's Supreme Court does not adhere to the broad principle that the community cannot be held liable except for community debts. The fact that it ruled otherwise in Gardner v. Gardner, supra, after first restricting Cosper v. Valley Bank, supra, to the principle that " the community property cannot be reached to satisfy separate contractual debts of the husband", shows that Arizona law does not support appellants' contention that Arizona law says the community is liable only for community debts and not for any separate debts thereby requiring proof that the debt or tort obligation arose as a result of community purposes being served. There is no need to prove a community purpose was served in order to sustain liability against the community where the law no longer holds that the community is liable only for community debts. When the law is only that " the community property cannot be reached to satisfy separate contractual debts", the fact that the debt is not a contracted debt results in a ruling that the community is liable. That was the

reasoning of the Arizona Supreme Court in Gardner v. Gardner, supra, when it held that the "key question" was whether the debt involved there was contracted or not, and then imposed liability on the community when it determined the debt was not contracted. By the same reasoning here, the debt arising from appellant DePinto's breach of fiduciary duty and tort was not a contracted debt, and therefore the community is liable.

B.

Assuming The Arizona Law Is That The Community Is Liable Only For Community Debts And That It Therefore Cannot Be Held Liable For A Husband's Breach Of Fiduciary Duty Or Negligence As A Corporate Director Unless The Husband Was Furthering A Community Purpose Or Benefit, There Is No Genuine Issue Of Material Fact As To The Serving Or Furtherance Of Community Purposes By Angus J. DePinto While A Director Of United.

The district judge, after hearing evidence on the prayer for a preliminary injunction, examining the exhibits offered and admitted into evidence at such hearing, and possibly influenced by appellants' immediate approval of his suggestion that the entire case might be submitted on the basis of the evidence presented at the hearing on

the preliminary injunction, concluded there was no genuine issue of material fact with respect to whether appellant Angus J. DePinto had furthered or served one or more community purposes while accepting and acting as a director of United Security Life. Thus, because the appellants themselves advance and rely on the Arizona legal truism that the community is liable for a corporate director's negligence where he was furthering a community purpose while holding such office,[5] it must follow that the motion for summary judgment was properly granted if the materials relied on by the district court reflect that there is no genuine issue of material fact as to any one or more community purposes having been fostered or served.

The first community purpose or benefit which the trial court found was as follows:

> " In our free enterprise society the corporation is the specific organ through which a modern society discharges

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4. R.T. at 194 contains the following:

" The Court: It seems to me if you both, if each side believes there would be no further evidence that would be presented, even on the final trial of this matter, that we might very well save everybody a lot of time if we could treat this as a hearing in this matter, a final hearing. "

Mr. Jenckes: We suggested that, your Honor, and I think counse wouldn't agree.

Mr. McLane: We think, your Honor, we can produce considerab evidence if given time to prepare, that there were a multitude of additional benefits other than the ones we have spoken of here today to the community."

The foregoing exchange shows that appellants had no further eviden

5. Appellants' opening brief at 12, 16.

its basic economic functions. The directors of corporations hold great power and have become a major leadership group, and as such have great responsibilities to the enterprise and the people they manage, and to the economy and society.* As a concomitant of such responsibilities and power, directors of corporations enjoy positions of prestige and high status in the community.

" Such status and prestige alone would, without anything else, confer a benefit upon the community of the plaintiffs."

That such status and prestige constitute a community benefit was recognized by the Supreme Court of Washington while sitting en banc. Kilcup v. McManus, 64 Wash 2, 771, 394 P.2d 375 (1964). There the court said:

" A community is liable for the tort of either spouse if the tort is calculated to be, is done for, or results in a benefit to the community or is committed in the prosecution of the community business. McManus acted under the color and authority of his public office, as a port commissioner and also as one holding a deputy sheriff's commission. As a port commissioner, he occupied a position of honor and public esteem, bringing these benefits to his community, ..."

(Underscoring supplied)

The foregoing recognition that a port commissioner received public

esteem and honor was not a finding based on testimony or affidavits but on the court's knowledge of the position's status and prestige. The same is true here of the district court's recognition of the prestige and status accorded corporate directors particularly those on the boards of publicly held corporations.

Nevertheless, appellants claim that the district court's "assumptions", as they label his findings, were "completely dissipated" by the testimony and affidavit of Dr. DePinto and by the affidavits of Dr. Lentz and Mr. Roca, an attorney. But what this amounts to is an argument that the findings of fact of a trial judge which are ultimate findings can be controverted by testimony which is the basis of his findings and affidavits filed after the findings are made. Certainly this would have no effect on such findings at the end of a trial, and the only question here is whether his findings can be so controverted after a hearing on a preliminary injunction has produced such findings and a motion for summary judgment has been filed. The answer is no if the rule requires "genuine" issues of material fact in order to deny summary judgment. It is also no if the affidavits and testimony offered in contravention of such findings are ultimate facts. And it also no if the affidavits are insufficient.

Assuming arguendo that such affidavits, filed several months after the findings of the district court were made, are sufficient in

law to create a genuine issue of material fact, the question is whether such affidavits did in fact do so.

Rule 56 (e), Federal Rules of Civil Procedure, governs with respect to the requirements for affidavits submitted in opposition to summary judgment. The rule is mandatory and states that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Thus, as stated in 6 Moore, Federal Practice § 56.22 at 2327-2328:

> " Affidavits containing statements made merely on 'information and belief' will be disregarded.[21] Hearsay testimony and opinion testimony[22] that would not be admissable if testified to at the trial[23] may not properly be set forth in an affidavit. The affidavit is no place for ultimate facts and conclusions of law,[24] nor for argument of the party's cause."[25]

Also, an affidavit containing immaterial matters is not available.[6]

Turning to the three affidavits, and examining each insofar as the status and prestige finding is concerned, it is observed that the DePinto affidavit simply offers the conclusion that his directorship "could not and did not lend status or prestige" to him. This is merely

6. S.E.C. v. Payne, 35 F. Supp. 873, 876 (S.D. N.Y. 1940).

self serving opinion testimony of the litigant who is thereby arguing his case. It is clearly not based on personal knowledge since DePinto is not competent to testify whether, in the eyes of the community, many of whom do not have exalted opinions of their own status and prestige, such a position accords status and prestige to the holder thereof. That is, it may be true that former President Eisenhower or President Johnson would not obtain status or prestige from an appointment as a corporate director, but most lawyers and businessmen and physicians do. Also, DePinto's opinion would not be admissable in evidence, and is an ultimate fact. For these reasons the DePinto affidavit does not create a genuine issue of material fact respecting the district court's finding that his directorship in United gave the community status and prestige.

The affidavit of Dr. Lentz, which stated that he too was a member of the board of directors of a life insurance corporation thereby showing that he is equally interested with the DePintos in establishing a ruling relieving the marital community of liability, states flatly that it is inadmissable opinion evidence regarding the status and prestige finding when it states:

"It is the opinion of Affiant that Dr. DePinto's service as a member of the board of directors of United Security Life could not have been expected to, and did not, enhance the status or prestige of Dr. DePinto as a practicing obstetrician

or otherwise."

Such a statement would not be admissable since Dr. Lentz is not competent to so testify, is a statement of ultimate fact, is not based on personal knowledge as reflected by paragraph 3 thereof, and therefore does not create a genuine issue of material fact regarding the district court's finding that corporate directors enjoy positions of prestige and status.

On the other hand, the affidavit of Mr. Roca, who stated therein that he incorporated United Security Life, and who like Dr. Lentz is also a director of several corporations thus making him an interested party in obtaining a ruling discharging the community of liability, does not really attempt to create a genuine issue of material fact respecting the status and prestige finding. His affidavit simply states that:

> "... any personal contacts which Dr. DePinto may have made or any publicity which Dr. DePinto may have received as a member of the board of directors of United Security Life, did not contribute to or enhance, and could not have been expected to contribute to or enhance, Dr. DePinto's status and prestige in the community."

The same objections exist with respect to such statement as with that of Dr. Lentz. More importantly, the statement is rendered meaningless by the qualifying clause at the beginning thereof

which states that it is based on the information contained in the preceding paragraph 5 which sets forth the dates of DePinto's directorship, that he attended no meetings, and owned no stock or received any compensation. How can such facts serve as the basis of a fact statement that his status or prestige in the community was not enhanced? The conclusion is a non sequitor. Also, it is noted that the statement was that "personal contacts" or "publicity" could not have given him status or prestige. However, the district judge did not so find. He found that the position of director itself gave one status or prestige because directors have become a leadership group with great powers and responsibilities. Men who occupy positions of power automatically bring status and prestige to their respective marital communities. The affidavit of Mr. Roca is inadmissable opinion testimony, is not based on personal knowledge as the affidavit itself acknowledges, does not show affirmatively that the affiant is competent to testify, is a statement of ultimate fact, and on its face is not supported by the very paragraph it relies on. Consequently, it creates no genuine issue of material fact concerning the finding that corporate directors enjoy positions of prestige and status.

The three affidavits are not sufficient to create a genuine issue of material fact concerning the district court's finding that corporate directors enjoy positions of prestige and status.

The second community benefit or purpose found by the district court was:

> "... the circulation of the plaintiff's husband's name to members of the public to whom stock in the defendant corporation was being sold, this resulting in an ethical form of advertising for a physician and surgeon. Similar benefits flow from the curculation of his name among the policyholders and the other directors in the defendant insurance company."

While the district court did not mention it, the record here[7] and in Civil No. 2974 showed that DePinto was a businessman as well as a physician, having successfully managed real estate valued years ago at $500,000, and which in the current bankruptcy proceeding is listed at $754,109.44. Thus, the publicity he received, when 25 to 40 stock salesmen were selling stock with a prospectus publicizing him, also obtained for the marital community advertising helpful to a businessman.

As to this second finding, the affidavit of DePinto merely says that such circulation of his name did not constitute advertising of his medical practice. However, he testified that he could not say where most of his patients came from, is clearly not competent to testify what the public thought about such publicity thus making

7. R.T. 26.

the statement not admissable, and is offering an ultimate fact. The affidavit of Dr. Lentz on the point is preceded by the statement that it is his opinion, and is otherwise flawed as DePinto's affidavit. The statement in the Roca affidavit is not based on personal knowledge, is one of ultimate fact, is inadmissable, is nothing more than a conclusion, and is not supported by the paragraph it rests on.

Therefore, there is no genuine issue of material fact as to the finding that the DePinto community obtained a benefit from the circulation of DePinto's name among the public, policyholders, and other directors.

The third community purpose or benefit found by the district court was the following:

> " Even the assertion by the plaintiff-husband that he took a place on the Board of Directors in order to accomodate a friend of the plaintiff, fostered a community purpose by fostering the friendship between the DePinto marital community and the Kelly marital community. "

Here the affidavit of DePinto does not even attempt to respond. It sidesteps the finding by saying:

> " The friendship between the DePinto family and the family of James E. Kelly did not depend upon Affiants' service as a member of the board of directors of United

Security Life."

But the district court did not find that the DePinto-Kelly family friendship was dependent on DePinto's service as a director of United. It found that such action fostered the said friendhsip and thereby served a DePinto marital community purpose. The said statement of DePinto's is also insufficient to create a genuine issue of material fact for the same reasons set forth with respect to the first two findings of the district court. And since neither the Lentz nor the Roca affidavit even refer to the fostering of the DePinto-Kelly family friendship as having served a DePinto marital community purpose, neither creates a genuine issue of material fact on this finding.

In addition to the foregoing findings of community purpose and community benefits obtained by the DePinto marital community, the district court also acknowledged the effect of the holding in Babcock v. Tam, 9 Cir., 1946, 156 F.2d 116, on the issue of community benefit. The relevant part of the Babcock, supra, opinion stated:

> "... there can be no recovery against the community unless the husband was engaged in doing something which could be said to be beneficial to his principal, the marital community."

Thus, the district court ruled:

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> "... there can be no recovery against the community unless the husband was engaged in doing something which could be said to be beneficial to his principal, the marital community."

Thus, the district court ruled:

" The positive rewards that could have been realized or were realized by the plaintiffs by reason of plaintiff-husband's service as a director are limited only by the number of reasonable inferences that could be drawn from the fact of his service."

That is, the widening of DePinto's business and real estate associations through his fellow directors and some policyholders, the widening of acquaintances at the director's meeting he attended in March of 1955 in a setting which presented DePinto favorably as a physician and businessman, the obtaining of information from fellow directors about sources of mortgage financing from other insurance companies for his many real estate ventures, the opportunity to participate in directors meetings and thereby obtain the benefits of the business experience of other men as expressed by their views and judgments, the fostering of his business relationship with J. L. Jenkins as a fellow director, and the opportunity to appraise potential employees for his own business activities, are all benefits which were available to the DePinto community some of which were in fact realized by it.

The foregoing demonstrates that there were several community benefits or purposes achieved by DePinto's directorship in United, and about which there is no genuine issue of material fact. Appellants virtually conceded there was no genuine issue from their point of

view when they suggested that the evidence at the hearing on the preliminary injunction be considered as sufficient for a final hearing. The change of mind did not occur until after the district court denied the preliminary injunction and made the findings respecting community purposes and benefits at which point the three affidavits were filed in response to the appellee's motion for summary judgment. This chain of events leads to the conclusion that the issue of fact, if any, is not a genuine issue. However, when the findings are examined, it is apparent that there is no issue of fact concerning the several community purposes which were furthered by DePinto's directorship in United. Therefore, what is the point of appellants' appeal even if the district court and this court agreed with their version of the Arizona law and held that a marital community in Arizona is only liable for community debts and not for any separate debts or obligations of either spouse? The district judge has heard appellant DePinto testify, had read the affidavits of Dr. Lentz and Mr. Roca, and concluded that several community purposes or benefits had actually been realized.

There is one finding by the district court which was uncontradicted by the testimony and affidavits and which, standing alone, is sufficient to demonstrate that a community purpose was served by DePinto's directorship in United. That is the finding

that taking a place on United's board of directors fostered a community purpose by fostering the friendship between the DePinto marital community and the Kelly marital community. Nor is the finding avoided by appellants' contention that:

> " We submit that, under the law of the State of Arizona, the community cannot be held liable for an act of the husband which is performed solely as an accomodation to a friend."

However, this begs the issue. The fact that a community purpose was served cannot be refuted by arguing that the law relieves the community of liability if no community purpose was served as where the husband acts solely as an accomodation for a friend. The finding that a community purpose was served excludes the finding that the husband acted solely as an accomodation to a friend.

Also, the fact that a community purpose was so served has not been avoided by appellants' reliance on the two Washington cases of American Surety Co. of N.Y. v. Sandberg, 9 Cir., 1917, 244 F. 701, and Sun Life Assur. of Canada v. Outler, 172 Wash 540, 20 P. 2d 1110. First, appellants have presented these two cases to the court with a quotation from the 1938 Arizona Supreme Court case of McFadden v. Watson, supra, that: "We have always held that our community property law was more like that of the state of Washington than any of the other community property states, and

that the decisions from that state were very persuasive." As noted earlier this practice was rejected by the Arizona Supreme Court in Mortensen v. Knight, 81 Ariz. 325, 305 P.2d 463 (1956) wherein it turned to California and Texas and said the Washington cases, while informative, are not necessarily more persuasive than those of California or Texas. Second, and as the district judge noted here, the cases are not analogous. Here the appellants were not irrevocably committed to the possibility of a debt, but, as a director, the appellant husband had within his control the benefits he could realize for the community. He had the power and right to vote for fees for himself for performing services as a director, and the power to avoid any liability to his community by carrying out his duties as required by law. Thus, there were several community benefits or purposes to be obtained. On the other hand, in the two Washington cases, the courts pointed out that there was no possible chance for the community to obtain a benefit. The same distinction also applies to appellants' citation of Perkins v. First National Bank of Holbrook, 47 Ariz. 376, 56 P.2d 639 (1926). Third, if as the Arizona Supreme Court held in Hays v. Richardson, 95 Ariz. 64, 386 P.2d 791 (1963), the husband's act of driving the children to a television show constituted being "engaged in a community purpose", it is difficult to envision the same court holding that the fostering of a family friendship did not suffice in law as being engaged

in furthering a family purpose.

What appellants have done is ignore the variety of things about DePinto's directorship in United which did in fact serve a community purpose, or which "could be said to be beneficial" to the marital community, and claimed that his act was solely to help a friend. Then based on that faulty factual premise, the appellants contend that in law that is analogous to have signed a note as a guarantor or an indemnity agreement. By referring to such guarantor or indemnitor as having accomodated his friend and then labeling the assumption of his directorship in United as having accomodated his and his family friend Kelly, the argument is constructed that this case is the same as the Perkins case, supra, and the Washington cases involving the guarantee of a note or signing an indemnification agreement. The application of such law is equally as incorrect as the factual premise used.

Appellants conclusion that "there is no evidence which supports, in any way, the conclusion that Dr. DePinto's services upon the Board of Directors of United were in furtherance of a community purpose" is not borne out by the record. Further such statement is beside the point even if it were correct. The case cited by appellant Babcock v. Tam, supra, did not require evidence that a community purpose was in fact served. Rather, and just as the Washington Supreme Court did in Kilcup v. McManus, 64 Wash 2, 771, 394 P. 2d 3

the court itself looked to see whether the husband had engaged in something which "could be said to be beneficial" to the marital community. In that case the court ruled that the honor and public esteem from the position of port commissioner was sufficient to bring a benefit to the marital community. Here the district judge found that corporate directors, having power and responsibilities, also obtain as a concomitant of such power and responsibilities, status and prestige in the community in which they live. Would or should the Supreme Court of Washington pay attention to an affidavit filed by the appellant in the Kilcup case, supra, that the port commissioner did not have public esteem and honor, or affidavits containing the opinion of those in the same position as Kilcup that such commissioner had no such prestige or status?

There is no genuine issue of material fact as to several of the findings of the district court that DePinto community purposes were furthered by DePinto's directorship on the board of United. Therefore, assuming the law of Arizona was as the appellants claim - the community is liable only for community debts and not for any separate debts or obligations of either spouse - the district court found one or more community purposes or community benefits to have been obtained as a result of DePinto's directorship in United Security Life. As a result, the motion for summary judgment was properly granted.

II

The District Court Did Not Err In Denying Appellants' Prayer For Preliminary Injunction.

A prayer or motion for an injunction pendente lite is addressed to the judicial discretion of the district court. United States v. Corrick 298 U.S. 435; Ross-Whitney Corp. v. Smith Kline & French Lab., 9 Cir., 1953, 207 F.2d 190;[8] 3 Moore, Federal Practice § 65.04 (2) at 1630. The test on appeal is not whether the appellate court in its discretion would have granted or denied the injunction,[9] but whether the district court has abused its discretion.[10] It is, therefore, not sufficient for a losing party simply to contend on appeal, as appellants have here, that the district court should be reversed on the ground that "it is apparent that, after a trial on the merits, appellants will be entitled to a decree enjoining appellees from having judgment in Cause No. Civ. 2974 Phx satisfied out of their community property."[11] And since appellants have nowhere argued or shown specifically or

8. Meccano, Ltd. v. John Wanamaker, 253 U.S. 136; Mayo v. Lakela Highlands Canning Co., 309 U.S. 310; Rice & Adams Corp. v. Lathr 278 U.S. 509; Burton v. Matanuska Valley Lines, 9 Cir., 1957, 244 2d 647; Lane Bryant v. Maternity Land, 9 Cir., 1949, 173 F.2d 559, Doeskin Products v. United Paper Co., 7 Cir., 1952, 195 F.2d 356.
9. Burton v. Matanuska Valley Lines, 9 Cir., 1957, 244 F.2d 647; Benson Hotel Corp. v. Woods, 8 Cir., 1948, 168 F.2d 694; Sinclair Refining Co. v. Midland Oil Co., 4 Cir., 1932, 55 F.2d 42.
10. See cases cited in ftnt. 8 above.
11. Appellants' opening brief at 22-23.

otherwise that the district court abused its discretion in denying the prayer for a preliminary injunction, it is not possible for appellees to respond thereto. For this reason alone, appellants' appeal from the district court's denial of an injunction pendente lite should be dismissed.[12] Appellants' specification of error with respect to the denial of the preliminary injunction states that the district court erred "for the reason" that appellants would suffer irreparable harm if their community property were sold under execution to satisfy the judgment in Civil No. 2974. However, this misses the point.

In Yakus v. United States, 321 U.S. 414, Chief Justice Stone stated:

> " The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. ... Even in suits in which only private interests are involved the award is a matter of sound judicial discretion,

12. When there is a direct appeal to the Supreme Court from an order granting or denying an interlocutory injunction, Supreme Court Rule 15 (1) (g) requires the jurisdictional statement to include a showing of the matters in which it is contended that the district court has abused its discretion. It should follow that appellants appeal on this issue should be dismissed since they have not even argued the abuse of discretion by the district judge. The time to raise such arguments is not in the reply brief when appellees have no opportunity to answer and not in oral argument when appellees have had no opportunity to prepare a reply. Orderly procedure and fair notice to the adverse litigant is an important aspect of administering justice.

in the exercise of which the court balances the conveniences of the parties and the possible injuries to them according as they may be affected by the granting or withholding of the injunction. ... And it will avoid such inconvenience and injury as far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon payment of any damage caused by the injunction if the plaintiff's contentions are not sustained."

Thus, the fact that irreparable harm may result, assuming that it would, is not sufficient basis for reversing a district court which has denied a preliminary injunction. The losing party must assert as error and show that the district court abused its discretion in denying an injunction pendente lite. Alabama v. United States, 279 U.S. 229, 230-231 (1929).

The rule was stated by this court in Burton v. Matanuska Valley Lines, 9 Cir., 1957, 244 F.2d 647, 650:

"... we should first observe the limited scope of review which is permitted us from a temporary injunction...

"We know of no better statement of this principle than is found in Love v. Atchison T. & S.F. Ry. Co., 8 Cir., 185 F.2d 321, 333, as follows: 'But the granting or withholding of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and where,

as in the case at hand, that court has not departed from the equitable principles established for its guidance, its orders may not be reversed by the appellate court, without clear proof that it has abused its discretion * * * An appeal from an order granting or refusing an interlocutory injunction does not invoke the judicial discretion of the appellate court. The question is not whether or not that court in the exercise of its discretion would make or would have made the order. It was to the discretion of the trial court, not to that of the appellate court, that the law entrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion?"

Thus, appellants appeal from the denial of the preliminary injunction is defective not only because they failed to raise and argue this question but because the proof does not clearly establish an abuse of that discretion.

Even if this court should decide to examine the question of abuse of discretion by the trial judge although not assigned as error, it may wish to recall that it has already denied these appellants an injunction pending appeal on September 20, 1965 after the submission of lengthy briefs.

There is another reason why the district judge should not be reversed for denying the preliminary injunction. The district court

held that there exists in Arizona the legal presumption that a debt incurred by a married man during coverture is a community obligation and the burden of proof in overcoming it was on appellants. Donato v. Fishburn, 90 Ariz. 210, 367 P.2d 245 (1961); Osborne v. Mass. Bonding and Insurance Co., 229 F. Supp. 674 (D.C. Ariz. 1964). The district judge ruled that appellants had not overcome that burden. In addition there is also a rule in Arizona, not referred to by the district court, that "the presumption of law is, in the absence of a contrary showing, that all property acquired and all business done and transacted during coverture, by either spouse, is for the community." Benson v. Hunter, 23 Ariz. 132, 202 P. 233 (1921).

There is a third and fourth reason why the denial of the preliminary injunction should not be reversed. As was noted more fully at pages 11 through 25 in appellees' earlier memorandum herein opposing appellants' motion for an injunction pending appeal, (a) the order denying the preliminary injunction is not an appealable order within the provisions of 28 U.S.C. 1292 because it was a denial of a motion for a stay of proceedings or a motion for a stay of execution in Civil No. 2974 and therefore not a denial of a preliminary injunction, and (b) an injunction pending appeal should not issue because to do so would defeat the requirements of Rule 73 (d) and 62 (d) requiring the posting of a supersedeas bond to

stay execution in Civil No. 2974.

Next it is noted that appellants' current request that this court order the issuance of a preliminary injunction by the district court is simply a renewal of their earlier motion herein for an injunction pending appeal which motion was denied September 14, 1965. Since appellants have submitted less now than was submitted in their earlier motion, the present request should also be denied. Appellee repeats by this reference thereto the contentions set forth in his memorandum opposing appellants' motion for injunction pending appeal.

Finally appellee asks the court to reject appellants' implicit and unsupported assumption that it should, if it ordered that the district court be reversed for denying the preliminary injunction, also take away from the district court the authority and discretion to order such bond, after a hearing, as the district court deemed necessary to protect the party against whom the injunction would be issued. Appellants have cited no authority to support such a principle.

For the reasons that appellants have neither briefed the point nor assigned as error that the trial court abused its discretion in denying the preliminary injunction, the appeal from such denial should be dismissed because it has been abandoned. Peck v. Shell Oil Co., 9 Cir., 1944, 142 F.2d 141, 143; Stetson v. United States,

9 Cir., 1946, 155 F.2d 359, 361. For the reasons set forth in the preceding paragraphs of this Point II, the appeal from the order denying the preliminary injunction should be denied and the order affirmed.

Conclusion

In their argument appellants have not shown or attempted to show that there was a genuine issue of material evidentiary fact present in this case which would have precluded the lower court from entering summary judgment. The only issue in this case, and that to which appellants have limited their argument, is whether or not under the applicable law the appellees were entitled to summary judgment. It is respectfully submitted that appellants have failed to carry their burden of showing that appellees were not entitled to judgment under the applicable law and that the applicable law, as set forth in the foregoing argument of appellees, fully supports the judgment entered by the trial court. Said judgment should, therefore, be affirmed.

Respectfully submitted,

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Nola McLane
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: August 3, 1966.

William Lee McLane